

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b))
FM Table of Allotments)
FM Broadcast Stations)
(Au Gres, Alpena, Beaverton,)
Frankfort, Cheyboygan, and)
Standish, Michigan))
)

MM Docket No. 01-115
RM-10129
RM-10325

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO MOTION TO STRIKE

Northern Radio of Michigan, Inc. ("Northern Radio"), licensee of Station WKLT(FM), Kalkaska, Michigan, and permittee of Station WAIR(FM), Honor, Michigan, hereby respectfully submits its Opposition to the "Motion to Strike" filed by Fort Bend Broadcasting Company ("Fort Bend") on December 4, 2001. For the following reasons, Fort Bend's Motion must be denied:

On October 5, 2001, the Commission issued a Public Notice, Report No. 2506, announcing the receipt of Fort Bend's counterproposal in this proceeding with rulemaking number RM-10129. This rulemaking number, however, applies to the original petition for Au Gres, Michigan, and not Fort Bend's counterproposal. Upon the filing of Fort Bend's counterproposal the Commission should have issued it a new rulemaking number.

Upon realization of its error, the Commission issued a corrected public notice on October 23, 2001, in which it assigned a new rulemaking number and specified a new filing date for reply comments. Both Northern Radio and WATZ Radio, Inc. ("WATZ") timely filed reply comments on November 7, 2001.

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In support of its Motion to Strike, Fort Bend cites several cases dealing with the issuance of duplicative public notices. These cases are inapplicable to the case at hand for two reasons: first, they did not involve rulemaking proceedings. Public notices in rulemaking proceedings have to be accurate because they affect the public at large, not just a discrete group of litigants. Second the parties involved in these had actual notice of the relevant Commission proceedings. For example, Fort Bend cites Florida Institute of Technology, 952 F2d 549 (D.C. Cir. 1992) (hereinafter “Florida Technology”) for the proposition that where the Commission issues duplicative public notices, the second public notice is without legal effect. The Florida Institute case involved an applicant for a broadcast construction permit who was placed on an “A” cut-off list. Following the deadline by which competing applicants could file applications, the Commission issued a second “A” cut-off list and erroneously placed the applicant on that second cut-off list. When an application was filed in response to the second cut-off list, the Commission, realizing its error, properly dismissed the application. The instant case, however, is distinguishable from Florida Technology because the second public notice here was a corrected public notice, not a duplicate public notice.

Fort Bend also cites State of Oregon Acting by and through the State Board of Education, 8 FCC Rcd 3558 (1993), *aff’d* 11 FCC Rcd 1943 (1996) (hereinafter “State of Oregon”) for the proposition that duplicative public notices have no legal effect. State of Oregon also involved the issuance of a duplicative cut-off list. In State of Oregon, however, the Commission also issued a public notice rescinding the duplicative cut-off list. Consequently, the Commission dismissed an application filed pursuant to the duplicative cut-off list.

Finally, Fort Bend cites Crystal Broadcast Partners, 11 FCC Rcd 4680 (1996) (hereinafter “Crystal”), for the proposition that where a corrected public notice is issued, the first public notice establishes the filing deadline. In Crystal, an application for review of the assignment of a construction permit was returned as untimely because it was filed four days after the filing deadline. The petitioner there argued that the 30-day filing deadline should have been waived, and its application for review accepted, because the initial public notice incorrectly specified the city of license as “Rapid City, Wyoming” rather than “Rapid City, South Dakota.” The Commission held that the public notice given was sufficient because the petitioner admitted that it had actual notice of the filing deadline. The Commission noted that under these circumstances the issuance of a corrected public notice did not warrant a waiver that deadline.

In the instant case, the Commission issued a corrected public notice setting forth a different rulemaking number from that originally issued and invited comments on a different filing deadline. That invitation remained open until November 7, 2001. It is well accepted that interested and affected parties should be afforded an opportunity to respond to a petition for rulemaking. It is also established that the Commission will not give effect to either substantively or procedurally deficient public notices. See Colorado Christian University, 16 FCC Rcd 4326, 4328 (2001). This has been the practice in FM allocations proceedings. For instance, in Bridgeport, Bonham, Graham, Palestine, Price, Ranger and Stephenville, Texas, and Ardmore, Lawton, Tecumseh, and Fort Townson, Oklahoma, 16 FCC Rcd 3637, n.2 (Allocations Br. 2000), the Commission extended the deadline for comments on counterproposals based on the date of a corrected public notice where the original notice referenced the wrong docket number.

Here, the listing of the Au Gres, Michigan rulemaking number as the rulemaking number for Frankfort rendered the first notice a nullity. In effect, members of the public were given no reference number, or the wrong reference number, to place on any comments that they might wish to file. Therefore, the first notice was without legal effect and the staff properly issued the remedial public notice listing the correct rulemaking numbers for the communities subject to the notice. Thus, due to the material defect in the first public notice, neither Northern Radio nor WATZ were given proper notice. As a result, the Commission should not give legal effect to the first public notice.

WHEREFORE, in light of the foregoing, Northern Radio of Michigan, Inc. respectfully requests that the Commission DENY Fort Bend Broadcasting Company's Motion to Strike and DISMISS Fort Bend Broadcasting Company's counterproposal.

Respectfully submitted,

NORTHERN RADIO OF MICHIGAN, INC.

A handwritten signature in black ink, appearing to read 'H. Martin', is written over a horizontal line.

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December 13, 2001

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CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that a true copy of the foregoing *Opposition to Motion to Strike* was sent this 13th day of December 2001, via hand delivery and United States First Class Mail, postage prepaid, on the following:

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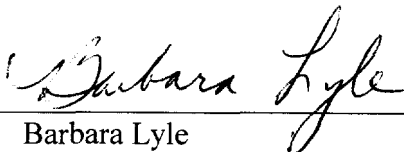
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